SUPREME COURT, U.S.

Office-Supreme Court, U.S.
FILED
SEP 3 1963
JOHN F. DAVIS

IN THE

Supreme Court of the United States

October Term, 1963.

No. 428

CITIZENS UTILITIES COMPANY,

Petitioner,

—v.—

CHARLES T. PROUTY, GENEVIEVE PROUTY GAGE, JOHN A. PROUTY, ELSINOR PROUTY MALLORY and THE THIRD NATIONAL BANK AND TRUST COMPANY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JESSE CLIMENKO
Attorney for Petitioner

GALLOP CLIMENKO & GOULD
360 Lexington Avenue
New York, New York

Of Counsel:
JESSE CLIMENKO
MILTON S. GOULD
NORMAN SOLOVAY

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Petitioner, Citizens Utilities Company, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above entitled case on June 24, 1963.

Citations to Opinions Below

By a 2 to 1 decision (unreported at this date) (Hays, *J.*, dissenting) which appears as "Appendix A" to this Petition, the Circuit Court of Appeals affirmed* the judgment of the United States District Court for the District of Ver-

* The judgment of the District Court was modified in certain respects irrelevant to this Petition.

mont which had ordered specific performance of a contract for the purchase of land, based on its interpretation of the preemptive effect of the Federal Power Act. The opinion of the District Court thus affirmed appears in the "Appendix to Defendant-Appellant's Main Brief" in the Circuit Court (hereinafter designated as "R.") at page 149a, and is reported at 209 F. Supp. 26. An earlier opinion of the District Court in this case, appearing in "Appendix B" to this Petition and reported at 150 F. Supp. 892, was reversed by the United States Court of Appeals for the Second Circuit in an opinion printed at R. 138a, and reported at 257 F. 2d 692, *cert. denied;* 358 U. S. 867.

In companion proceedings, an opinion was handed down by the Vermont Public Service Commission which is printed at R. 46a; the Supreme Court of the State of Vermont reversed the Vermont Public Service Commission in an opinion printed at R. 119a and reported at 122 Vt. 443, 176 A. 2d 751, *cert. denied;* 369 U. S. 838. Pertinent portions of the opinion and order of the Federal Power Commission are printed at R. 37a, and the entire opinion is reported at 27 P. U. R. 3d 183; the opinion of the Court of Appeals for the Second Circuit affirming the Federal Power Commission appears in "Appendix B" to this Petition and is reported at 279 F. 2d 1, *cert. denied;* 364 U. S. 893.

Jurisdiction

The judgment of the Circuit Court, which appears as "Appendix C" to this Petition, was entered on June 24, 1963. Rehearing was denied on July 17, 1963. The jurisdiction of this Court is invoked under 28 USCA §1254(1).

Questions Presented

1. Does the Federal Power Act require that whenever the Federal Power Commission makes a determination as to the navigability or partial navigability of a waterway of the United States, such determination must have the following consequential impact on a state's power of eminent domain over land needed by a public utility abutting such waterway:

(a) That a state regulatory agency's previously existing condemnation jurisdiction is *retroactively* preempted by the Federal Power Act, so as to nullify contracts made, or other actions taken in good faith reliance thereon, even though a penalty or forfeiture is thereby imposed on a public utility; or

(b) That a state regulatory agency must be deemed never to have had any condemnation jurisdiction in respect of such land even prior to the Federal Power Commission's assumption of jurisdiction or commencement of investigation of the question of navigability, with the effect that actions taken by such agency and any rights of a utility deriving therefrom, must *retroactively* be deemed null and void once the Federal Power Commission makes its determination that a waterway is navigable.

2. Can a federal court, sitting in a diversity case and purporting to apply state law, hold that, by virtue of the state courts' interpretation of the Federal Power Act, a state regulatory agency must be deemed never to have had jurisdiction to condemn land, in the face of a clear pronouncement by the highest court of the forum state (even by way of dictum) that this jurisdiction *was* once present but has been subsequently ousted?

3. Was Judge Hays (dissenting in the Circuit Court) correct in his view that the Vermont Public Service Commission was an appropriate body before which to bring a condemnation proceeding, within the intendment of the language of the contract here in question, and that the majority had construed the contract with a strictness violative of the intent of the contracting parties?

Statutes Involved

The statutory provisions involved herein are Section 23 of the Federal Power Act, 16 USCA §817, which is printed at R. 142a; Section 27 of the Federal Power Act, 16 USCA §821, which appears in "Appendix B" to this Petition; and Sections 9331-9333 of the Vermont Statutes, which are printed at R. 143a.

Statement

The district court, which obtained jurisdiction solely through diversity of citizenship, was of opinion that the Federal Power Act compelled a holding that the Vermont Public Service Commission *never* had condemnation jurisdiction in respect of land located along the Clyde River because the Federal Power Commission determined that the river was a navigable waterway. The district judge interpreted the prior holding of the Vermont Supreme Court in a companion action,* to the effect that the Public Service Commission's condemnation jurisdiction was "ousted" *subsequent* to assumption of jurisdiction by the Federal Power Commission, as meaning that no such jurisdiction had ever previously existed, stating (at 209 F. Supp. pp. 29-30):

* Reported at 122 Vt. 433, 176 A. 2d 75; R. 119a.

> "If jurisdiction does not exist over the subject matter in a particular court or tribunal, it never existed, and there is nothing to be lost or ousted. Therefore when the Vermont Supreme Court states that the Vermont Public Service Commission did not have jurisdiction of the subject matter now in controversy, it is declaring that jurisdiction over this matter never existed in the Vermont Public Service Commission. The Clyde River is navigable water, and the Federal Power Commission has had exclusive jurisdiction over it, certainly since the creation of the Federal Power Commission."

The Circuit Court, in affirming the court below, expressed some disagreement with the lower court's view "that a present lack of jurisdiction *requires* a finding that jurisdiction has always been absent." (Emphasis added.) (Appendix A, p. 5a). Nevertheless, it reached the same conclusion as the district court after similarly purporting to construe the Federal Power Act in the same manner as the Vermont Supreme Court would supposedly have done. Thus, after examining the question of the Vermont Public Service Commission's jurisdiction, *de novo*, the Circuit Court concluded that the Vermont Supreme Court's statement that the jurisdiction of the Vermont Public Service Commission was *ousted* (R. 130a) should be disregarded (Appendix A, p. 5a). It went on to hold that the Federal Power Act, as supposedly construed in an earlier Vermont decision,* compelled a finding "that Federal legislation had preempted the field and that the Commission had no jurisdiction to act" . . . "*even in the absence of any federal action.*" (Appendix A, p. 6a) (Emphasis added.)

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* *In Re Bellows Falls Hydroelectric Corp.*, 114 Vt. 443, 47 A. 2d 409 (1946).

The Facts

The foregoing judicial interpretation of the Federal Power Act's effect on the jurisdiction of a state agency arose in the following factual context:

On March 27, 1956, Citizens Utilities Company (hereinafter "Citizens") filed its petition for condemnation of certain lands of the instant respondents, situated along the Clyde River in Orleans County, Vermont. These lands are located between a dam and a generating station which have been maintained and operated by Citizens for many years.

For 25 years prior to October 1, 1955, Citizens and its predecessors occupied respondents' lands as tenants under a written lease which provided that the lessee could acquire title to the property prior to October 1, 1955 for the sum of $150,000. In the event that the property was not acquired pursuant to that option, it was provided that within six months after October 1, 1955, the termination date of the lease, the lessee would purchase and the owner would sell the property at a mutually satisfactory price, or, if the parties could not agree upon a price, acquisition of the land was to result from the lessee's institution of proceedings to acquire the property by condemnation, "such proceedings to be instituted before the tribunal *then having jurisdiction of such proceedings*. . . ." (Emphasis added.) The lease further provided that if the lessee did not institute such condemnation proceedings within six months following October 1, 1955, the price for the property was fixed at $300,000.*

* In *1959*, the Vermont Public Service Commission, after hearings, found the fair value of the property to be $95,000 (R. 69a). It would appear, on its face, that the $300,000 value figure established 30 years before, in 1930, could only have been intended as a penal provision, possibly designed to compel speedy institution of condemnation proceedings after the expiration of the lease.

Citizens concededly filed its petition in condemnation with the Vermont Public Service Commission within the required six-month period following the termination of the lease on October 1, 1955 (R. 48a).

Shortly after filing of the petition, respondents herein interposed a so-called "plea to the jurisdiction" (R. 48a) before the Vermont Public Service Commission. By such plea, respondents urged that the Commission had no jurisdiction in the condemnation proceedings because the Clyde River was navigable waters of the United States and Citizens had not obtained a license from the Federal Power Commission for the maintenance and operation of its facilities thereon, notwithstanding that prior to this time the Federal Power Commission had never asserted nor attempted to impose its jurisdiction on any portion of the Clyde River or Citizens' facilities.

On May 11, 1956, before any ruling from the Vermont Public Service Commission on their "plea to the jurisdiction," respondents commenced the instant action against Citizens in the United States District Court for the District of Vermont. The District Court was asked to declare, in advance of any other adjudication, that the Clyde River was navigable waters of the United States; that Citizens was required to have a license from the Federal Power Commission in order to maintain its facilities thereon; and that the Public Service Commission was on that account ousted of jurisdiction over Citizens' petition for condemnation. The relief sought in the Complaint herein was an injunction against further proceedings by the Vermont Public Service Commission in the condemnation proceeding, and a decree of specific performance in respect of the *penal provision* of the lease agreement, whereunder Citizens was to pay respondents $300,000 for the property.

The District Court initially directed entry of judgment for specific performance in favor of respondents and against

Citizens (150 F. Supp. 892). On appeal from that decision to the United States Court of Appeals for the Second Circuit, the decree of the District Court was reversed. (257 F. 2d 692, *cert. denied* 358 U. S. 867); the Circuit Court held that it was error for the District Court to have interfered with the Public Service Commission's *in rem* jurisdiction over the property in the condemnation proceeding and further concluded that the Public Service Commission had a right to determine for itself any jurisdictional objections without interference from the federal court.

While proceedings were going forward in the district court action and on the appeals from the decree therein, the Vermont Public Service Commission took no action on Citizens' petition for condemnation. Not until after respondents' petition for certiorari to the United States Supreme Court had been denied did the Commission proceed with the condemnation action.

In June of 1957, over two years after institution of Citizens' condemnation proceeding, the Federal Power Commission instituted a proceeding to determine whether the Clyde River was navigable waters within the meaning of the Federal Power Act. In August 1958, the Chief Presiding Examiner of the Federal Power Commission held that only a limited portion of the stream was navigable (such portion not including any of the stream adjacent to the lands here in question) but nevertheless concluded that a portion of certain of Citizens' facilities on the stream affected the interest of interstate or foreign commerce in the first mile section of the stream (such portion not including any of the stream adjacent to respondents' lands) and directed that Citizens apply for a license for such facilities. Early in 1959, the full Federal Power Commission handed down a decision holding that the entire Clyde River was navigable. Thereupon Citizens appealed from the Com-

mission's Order to the United States Court of Appeals for the Second Circuit. That Court made a decision of *limited affirmance* of the Commission's Order (279 F. 2d 1), holding only that the first mile of the Clyde River from its mouth was navigable waters of the United States, and that certain of Citizens' facilities on the stream affected the interests of interstate or foreign commerce *in that first mile section.* The Court expressly reserved the question of the navigability of the Clyde River as a whole.

On June 12, 1959, the Vermont Public Service Commission overruled respondents' "plea to the jurisdiction." After holding that it had jurisdiction over the condemnation proceedings, the Commission granted Citizens condemnation of the lands and fixed compensation therefor in the sum of $95,000 (R. 69a).

On Appeal being taken to the Vermont Supreme Court from the decision of the Vermont Public Service Commission, it was held that the Commission had erred in ruling that it "retained jurisdiction" *subsequent* to the Federal Power Commission's assertion of jurisdiction over the project (R. 127a). Referring to the "change in both the factual and legal situation presented for its [the Vermont Commission's] consideration," * the Vermont Supreme Court went on to speak of the requirement of a Federal Power Commission license *newly* imposed on Citizens "[d]espite the fact that its project *might have been previously built under State authority* (R. 130a)." (Emphasis added.) In similar vein, the Vermont court set forth its view that once a federal agency, such as the Federal Power Commission, "assumes jurisdiction of a particular case after a

* The change to which the Vermont court had reference was, of course, the assertion of jurisdiction by the Federal Power Commission pursuant to its finding of navigability (R. 130a).

state board has *taken jurisdiction* thereof, the state board's jurisdiction is *ousted* (R. 130a)." (Emphasis added.)

Thereafter, the district court handed down the decision herein which, as modified and affirmed by the circuit court, is sought to be reviewed by the present Petition.

Reasons for Granting the Writ

1. The interpretation placed on the Federal Power Act by the court below is of far-reaching import to the Act's administration. This case squarely poses—apparently for the first time—the question as to the existence and scope of a state's power of eminent domain over land abutting *possibly* navigable waters, *prior* to any determination of navigability by the Federal Power Commission.

Although this case arises in the setting of a contract dispute between private parties, the decision here sought to be reviewed represents a clear and widely applicable holding relating to the impact of the Federal Power Act on federal-state condemnation jurisdiction. The inescapable thrust of the decision is that the Vermont Public Service Commission's jurisdiction to condemn had been wholly preempted by the Act, for otherwise the Commission would have been the "tribunal then having jurisdiction" within the meaning of the contract, even if it were necessary to cure certain procedural defects (lack of license) before the Commission made a final adjudication in the course of exercising such jurisdiction.

Pursuant to the interpretation placed on the Act by the district and circuit courts below, a state condemning agency and a utility which has derived property rights therefrom, act completely at their peril. Under the *ratio* applied below, a determination of the Federal Power Commission, handed down *subsequent* to adjudications of the state agency,

has the effect of retroactively doing away with previously established rights, for the decision of the court below constitutes a square-holding that a state regulatory agency's *jurisdiction* is completely non-existent whenever there is a failure to satisfy the procedural requirements concerning licenses prescribed by the Federal Power Act. Such a holding of *jurisdictional disqualification*, it should be noted, goes far beyond a ruling that the state agency and utility deriving rights therefrom must *eventually* comply with these Federal Power Act licensing requirements. The reasoning of the decision below does not even permit the agency or utility to cure any procedural defects *after* a decision has been handed down by the agency, or after commencement of hearings by the agency; the agency's jurisdiction, according to the circuit court below, is *ab initio* preempted unless and until the federal procedural licensing requirements have *first* been met.

A ruling by this Court would eliminate the uncertainty concerning public utility property rights and the authority of state condemning agencies which the decision below may have engendered in innumerable cases where a Federal Power Commission adjudication has followed earlier condemnation decisions of a state agency.

2. It is submitted that the decision of the court below incorrectly interprets the Federal Power Act and conflicts with an applicable decision of this Court* in respect thereto (see p. 12, *infra*).

Section 23 of the Federal Power Act (R. 142a) prohibits the *construction*, *operation*, or *maintenance* of hydro-electric projects and adjuncts thereto on navigable waters without

* *Grand River Dam Authority* v. *Grand Hydro*, 335 U. S. 359 (1948).

a federal license; it places no prohibition on the *commencement* of condemnation proceedings looking towards *eventual* acquisition of land to be used for such purpose whether or not a federal license has been obtained in advance of instituting such proceedings.

The Act does not presume or purport to set up a strictly-ordered procedural eminent domain timetable which will be binding on the states; nor would there be any reason or purpose to reading such a timetable into the language of the Act. Section 27 of the Act (Appendix B, at p. 30a), which specifies that the Act is in no way intended to interfere with the laws of the respective states in respect of rights that have been vested in waterways, negates any such interpretation. So also does the decision of this Court in the *Grand River Dam* case, *supra*, which clearly indicates that the commencement of a condemnation proceeding under state auspices was *not* a void or ineffective act, notwithstanding that no federal license had been obtained in advance of its institution.

In the *Grand River Dam* case, which arose on facts analogous to the present case, a state condemnation proceeding had been commenced in February, 1939 (335 U. S., at p. 364), shortly *after* the Federal Power Authority had determined that the project for which the land was sought would affect navigable waters. No federal license was obtained *until six months later*, in July of 1939 (335 U. S., at p. 366). Notwithstanding this delay, no question was raised before or by the courts, nor, from anything that appears, before or by the state condemning agency, concerning the lack of a federal license. Moreover, notwithstanding that this so-called jurisdictional defect (as it was interpreted to be by the circuit court below) appeared on the face of the record, the condemnation award in the *Grand River Dam* case was

upheld by the state court and, subsequently, by the United States Supreme Court.

Accordingly, the teaching of the *Grand River Dam* case is clearly that the *initial* failure of a public utility to obtain a federal license does not constitute a barrier to *commencement* of state condemnation proceedings. If this conclusion be valid, there can be no question that the Vermont Public Service Commission had jurisdiction at the time Citizens *initiated* its condemnation action and the decision below must therefore be reversed.

3. The decision below also raises a significant federal procedural question concerning the weight that circuit and district courts, sitting in diversity cases, should accord to pronouncements by the highest court of the forum state which may not rise to the level of definitive decisional holdings.

Both the district and circuit courts below purported, in their decisions, to be applying Vermont law in determining the existence or non-existence of condemnation jurisdiction in the Vermont Public Service Commission *prior* to any assumption of jurisdiction by the Federal Power Commission. Nevertheless, the facts hereinabove set forth (*supra*, p. 9) make it clear that the Vermont Supreme Court was definitely of the view that the Vermont Public Service Commission did *once* have jurisdiction which was *subsequently* "ousted"; such opinion was ignored because of the circuit court's conclusion that "the Supreme Court of Vermont did not have the issue of initial jurisdiction before it . . ." (Appendix A, at p. 5a.)

The circuit court purported to rely, instead, on the *Bellows Falls* decision* as being indicative that the Vermont

* 114 Vt. 443, 47 A. 2d 409 (1946).

Supreme Court would hold the condemnation jurisdiction of the Public Service Commission to have been prospectively ousted by the Federal Power Act unless and until a federal license was obtained by a public utility.* However, the challenge to the Vermont Public Service Commission's jurisdiction in the *Bellows Falls* case arose only *after* the Federal Power Commission had assumed jurisdiction and had thereby (according to the Vermont Supreme Court) preempted the field. The Report of the Vermont Public Service Commission herein explicitly makes this distinction (R. 49a) and, in this respect, was not reversed by the subsequent opinion of the Supreme Court of Vermont (R. 119a).

Quite clearly, then, the circuit court's exclusive reliance on *Bellows Falls* was misplaced and the sole meaningful guide to the determination that the Vermont Supreme Court would have itself made herein is the decision of that court in the companion case (R. 119a) hereinabove referred to. Controlling federal decisions require that a federal court, sitting in a diversity case, must give due weight to *all* pronouncements by state tribunals, even if they be dicta. For example, in *Yoder* v. *Nu Enamel Corp.*, 117 F. 2d 488, 489 (8th Cir. 1941), this rule was stated as follows:

> "In the application of a state statute, the federal courts are, of course, bound by the construction made by the courts of the state. Senn v. Tile Layers Union, 301 U. S. 468, 57 S. Ct. 857, 81 L. Ed. 1229. And the obligation to accept local interpretation extends not merely to definitive decisions, but to considered dicta as well. Hawks v. Hamill, 288 U. S. 52, 53 S. Ct.

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* Applicable Vermont statutes (R. 143a) make no mention whatsoever of *when* the federal license must be obtained. Accordingly, the circuit court's *sole* support for its conclusion was the *Bellows Falls* decision.

240, 77 L. Ed. 610; Badger v. Hoidale, 8 Cir., 88 F. 2d 208, 109 A. L. R. 798. Indeed, under the implications of Erie Railroad Co. v. Tompkins, 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188, 114 A. L. R. 1487, and West v. American Telephone and Telegraph Co., 61 S. Ct. 179, 85 L. Ed. ——, where direct expression by an authorized state tribunal is lacking, it is the duty of the federal court, in dealing with matters of either common law or statute, to have regard for any persuasive data that is available, such as compelling inferences or logical implications from the related adjudications and considered pronouncements. The responsibility of the federal courts, in matters of local law, is not to formulate the legal mind of the state, but merely to ascertain and apply it. Any convincing manifestation of local law, having a clear root in judicial conscience and responsibility, whether resting in direct expression or obvious implication and inference, should accordingly be given appropriate heed."

It is respectfully submitted that the circuit court below has violated this policy by failing to accord sufficient attention and weight to the statements by the Vermont Supreme Court (See p. 9, *supra*) which would clearly indicate its view that jurisdiction was present in the Vermont Public Service Commission until *subsequently* ousted by the Federal Power Commission's later determination of navigability.

4. If it is assumed that the circuit and district courts below were correct in their analysis of the *Bellows Falls decision*, so that the Federal Power Act would, in fact, be regarded as compelling the conclusion reached below under applicable Vermont law, it was then error not to have

considered controlling federal precedents, including the *Grand River Dam* case, *supra*, which require a contrary conclusion.

The *Grand River Dam* case is also squarely in point as regards the attempt here by the circuit and district courts to rest their decisions exclusively on purported state decisional grounds. It was specifically stated in *Grand River* (at pp. 369-70):

> ". . . the fact that the state court purported to rest its decision largely on state law does not eliminate our duty to consider the question to the extent that it arises under federal law [citing numerous cases]. Again, it is suggested that the Federal Power Act has superseded the state law and has set up a new standard of valuation binding upon the state even in a condemnation proceeding under state law. It is, of course, for us to examine whether questions of federal law were necessarily, although only impliedly, adjudicated by the state court."

As in *Grand River*, the presence of a federal question in this case stands out starkly, notwithstanding the interposition and purported reliance by the district and circuit courts on the supposed interpretation of the Federal Power Act set forth by the Vermont Supreme Court in its *Bellows Falls* decision.

5. The dissenting opinion in the circuit court claimed that the interpretation placed on the meaning of the word "jurisdiction" by the majority was, as a matter of contract law, overly formalistic and unwarranted (Appendix A, at p. 8a). To the extent that the Federal Power Act can be interpreted, as was done below, so as retroactively to preempt jurisdiction of a state agency, the dissent's view presents still another reason for granting this Petition.

It should also be noted, in this connection, that this narrowly restrictive contract interpretation has been imposed by the court below without any indication that the Vermont courts would have countenanced it. Furthermore, a forfeiture will thereby be imposed on a public utility with the necessary, consequent result that it will be passed on to countless consumer customers.

CONCLUSION

For the above reasons, petitioner prays that a Writ of Certiorari be granted.

Respectfully submitted,

JESSE CLIMENKO
Attorney for Petitioner

GALLOP CLIMENKO & GOULD
360 Lexington Avenue
New York, New York

Of Counsel:
JESSE CLIMENKO
MILTON S. GOULD
NORMAN SOLOVAY